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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>REGIS ANTHONY COOPER,<br>Defendant and Appellant. | G042559<br>(Super. Ct. No. FSB701151)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of San Bernardino County, Kyle S. Brodie, Judge. Affirmed as modified.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Regis Anthony Cooper of second degree murder. The court sentenced him to 15 years to life and imposed a restitution fine of $5,000, a parole revocation fine of $5,000, a criminal conviction fine of $30 under Government Code section 70373, subdivision (a), and restitution in the amount of $7,500. Defendant appeals, contending that the court improperly admitted character evidence and denied admission of evidence of his victim's lifestyle, that a witness's statements were coerced, that his own statements violated *Miranda* v. *Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*), and that the $30 assessment was erroneous. We agree only with the latter contention and otherwise affirm the judgment. Defendant also notes that there are errors in the minute order and the abstract of judgment; we agree and order the abstract corrected.

## FACTS

Shortly after defendant moved in with the victim, Linda Odom, she disappeared; several months later her body was found. An autopsy disclosed skull fractures indicating at least two blunt object blows. A great deal of circumstantial evidence pointed to defendant as Odom's killer. He gave a variety of explanations for her whereabouts between the day she disappeared and his arrest. We need not recite this evidence here because most of it does not pertain to any issues in the appeal. To the extent there is a relationship between the evidence and the issues on appeal, we will note it in our discussion.

Shelleigh Lewis, defendant's girl friend and the mother of three of his children, was questioned by the police after she agreed to a polygraph examination. (No such examination was conducted because of Lewis's pregnancy.) During that interview several times she related that defendant told her on many occasions that "he did it" and

she thought he told her he had stabbed the victim. When she noticed defendant acting strangely in the victim's apartment hallway, she questioned him and defendant stated "something in reference to stabbing her." During the trial, Lewis testified she had lied to the police.

## DISCUSSION

*1. Evidence relating to defendant's state of mind was properly admitted.*

Before the trial started, there were a number of discussions between the court and counsel concerning the prosecutor's introduction of evidence relating to defendant's mental state and his having been prescribed psychotropic drugs. The trial court's initial ruling on this subject was inconclusive. Later the court ruled the prosecutor would be permitted to introduce some of this information.

Over defendant's relevancy objection, Officer Rachel Tolber testified defendant disclosed he was taking Prozac and Risperdal because he was under the care of a psychiatrist and had been diagnosed with schizophrenia when, at about 9 or 10 years old, he started to hear voices. He told her that, when he stops taking his medication, he hears voices that sound angry; for example they tell him to punch someone or throw something at somebody. At some time, defendant had almost strangled or killed someone while off his medication. Thereafter he started to take his medication again. Defendant said that he was taking his medication "on or around" the time of the victim's disappearance.

Lewis stated during her police interview that defendant has a "mental disorder, a behavioral disorder and that's why he's supposed to take medicine . . . ." She said that, when defendant fails to take his medication, he has a "really bad" temper.

Defendant's aunt, Jamie Marie Ellis, provided additional testimony relating to defendant's use of psychotropic medications and his angry moods when he fails to do so.

Defendant characterizes this evidence of his mental condition as "propensity evidence" and provides authority for the proposition that "propensity evidence" is generally not permitted. He also argues that admission of this evidence violated his right to due process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments. The Attorney General questions whether defendant's relevancy objection was sufficient to place the issue before us. But the pretrial discussions with the trial court provide an adequate record of counsel's objections; the mere failure to use the term "propensity evidence" is not fatal and it is sufficiently clear that counsel's objection was grounded on this theory.

Defendant maintains this "propensity" evidence was improperly admitted in violation of Evidence Code section 1101. But this argument ignores the purpose for which the evidence was admitted: his motive for committing the murder. As such it is expressly permitted under Evidence Code section 1101, subdivision (b): "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact []such as motive . . . ." Evidence of defendant's bad temper and angry moods was relevant to show an alternative motive for the murder. Evidence of a mental illness would help to explain these characteristics. We realize that there may be a violation of due process where there are '"no permissible inferences a jury may draw from"' erroneously admitted evidence. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384, italics omitted.) But because the evidence was relevant and permitted the jury to infer a motive for the murder, due process was not offended.

Defendant also argues the evidence concerning his mental condition required expert witness testimony, citing *People v. Moore* (2002) 96 Cal.App.4th 1105. But this case deals with a different issue. In *Moore*, the defendant argued the court

should have instructed the jury with CALJIC No. 3.32. That instruction states the jury should consider evidence of a mental disease, defect, or disorder to determine whether the defendant formed a specific intent, premeditated, or harbored malice aforethought. The case held that expert medical testimony was required before the instruction need be given. (*Id*. at p. 1117.) But here the evidence of mental illness was only relevant to provide context to the evidence of defendant's bad temper and angry moods. Defendant's mental illness, as such, was not an issue in the case. Characteristics such as bad temper and angry moods lie within the ordinary experiences of jurors. "Where there is no danger of jury confusion, there is simply no need for . . . expert testimony. [Citation.]" (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.)

*2. Evidence of the victim's lifestyle was properly excluded.*

Defendant next complains his due process rights were violated when the trial court excluded evidence concerning the victim's use of drugs and alcohol and concerning her lifestyle. He made an offer of proof showing that the victim's "drug and alcohol abuse, including showing up to work drunk, which led to her getting fired, and her habits and lifestyle, was relevant to establish an alternate cause of death: she could have walked away or fallen and hit her head, or been murdered by someone else." Defendant fails to provide any direct authority to support the contention; his citations deal generally with due process requirements. And his argument both here and in the trial court was to a significant extent based on the premise that, because the court was admitting certain evidence concerning his own mental state, it would only be fair to admit evidence of the victim's mental state. We are not aware of any such "tit for tat" rule of evidence.

Defendant argued that the victim's use of drugs and alcohol could be used to explain that she might merely have wandered away and fallen. The trial court

concluded, "I find it a difficult leap to make that an alcoholic is more likely to disappear and end up dead in a field or grove or wherever it was, some 30-odd miles from her home than a non-alcoholic." Later, defendant stated he wanted to offer testimony to show that the victim brought strangers in her home and had sex with them. The trial court said it believed such evidence was based on "misogynistic inferences about women" and not indicative that it was "more or less likely" the victim was killed by defendant. Still later, defendant argued the victim's lifestyle would show she "is the kind of person that could have met with foul play by someone other than [defendant]." The court again denied the offer of proof and stated "the fact that [the victim] liked to drink in the abstract doesn't have any connection to her disappearance . . . ."

We agree with the trial court that the type of evidence defendant attempted to introduce would merely invite the jury to speculate; there was no indication that any of these characteristics of the victim was present the night she disappeared. "A trial court's exercise of discretion in admitting or excluding evidence is reviewable for abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice [citation]." (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 361; see *People v. Davis* (2009) 46 Cal.4th 539, 602.) The court had a rational basis for excluding the evidence and there is no reason for us to conclude its rulings constituted an abuse of discretion.

*3. Lewis's statements to the police were properly admitted.*

As noted earlier, during a police interview Lewis, defendant's girlfriend, stated defendant admitted to her he had killed the victim. Defendant sought to exclude evidence of the interview, arguing that her statements were coerced. The court conducted a hearing before the jury was called during which Lewis testified to the circumstances

surrounding her statements. She said that, after she visited defendant in jail, she was approached by two officers who told her they were investigating defendant for the victim's murder, they knew he was guilty, and they had found the victim's skeletal remains. She also testified the officers told her she needed to cooperate or she would lose her children and go to jail. Lewis said she did not know anything.

One of the officers, Sergeant Mark Hardy, testified police ran across Lewis by accident as they were leaving the jail. Hardy told her they wanted to talk to her about defendant and the victim and that he believed defendant was involved in the victim's disappearance. The officers did not tell Lewis that the victim was dead or murdered. Hardy did inform Lewis it was necessary for her to cooperate and be truthful; he stated he "wanted to know the truth either way." He acknowledged telling her "if she withheld information from us, if she lied to cover up either her involvement or [defendant's] involvement and we found out, that the consequences of that would be possibly her being arrested and her kids being taken away, given to C.P.S."

The next day, Lewis had a conversation with Detective Tolber at Lewis's mother's home. The conversation was pleasant. Nevertheless, Lewis stated she was afraid at the time she might go to jail and lose her children. A day or two later Tolber returned and Lewis consented to submitting to a polygraph examination. The two went to a police station's polygraph room, where she was interviewed by Michelle Gamboa. Lewis testified she was scared because Gamboa told her the lie detector could pick up anything and, although she did not remember Gamboa mentioning the subject, she still feared going to jail and having her children taken away. Lewis then claimed that, because she was scared, "I didn't want to go to jail, and I felt like if I just told them what they wanted to hear, then they would leave me alone." But, in fact, after Lewis disclosed defendant's admissions, she volunteered how difficult it had been to lie and she stated she felt better "because it's off my chest."

Lewis was also called to testify at defendant's preliminary hearing. Once this subject arose in the hearing preceding the trial, the court called a recess and appointed counsel to represent Lewis because of concerns she might have committed perjury at the preliminary hearing. Lewis invoked her right to remain silent under the Fifth Amendment to most subsequent questions by defendant's attorney concerning her testimony at the preliminary hearing. She did testify that, at the preliminary hearing, the judge sent her to jail for refusing to answer questions. The judge told her if she did not answer questions she would be returned to jail; this added to her fear.

It is clear from Lewis's testimony that her fear was subjective rather than intentionally caused by the officers. The statement allegedly made by the officers that, if she did not cooperate, she could go to jail and lose her children, to the extent that it induced fear, would seem to provide motivation to be truthful, rather than falsely accuse her boyfriend of having admitted to having committed the murder. The contemplated polygraph, although it was not actually used, again would motivate Lewis to be truthful rather than lie. Lewis acknowledged the officers never asked her to lie and only told her to tell the truth. We do not consider the facts surrounding Lewis's statements as demonstrating the kind of coercion that would require the court to exclude the statements. There was substantial evidence supporting the trial court's ruling the statements were not coerced. (See *People v. Markham* (1989) 49 Cal.3d 63, 71-72.)

*4. Defendant's statements were properly admitted.*

After some earlier discussions with police officers, not relevant to this issue, Sergeant Hardy asked defendant if he would be willing to take a polygraph test. Defendant answered that "he would take one right now." Some time thereafter, Detective Tolber arranged for a polygraph examination. When defendant was being taken to the officers' car, the officer explained they were there because of his stated willingness to

take a polygraph test, whereupon defendant declined, first stating he was upset with the officers because his name had been in the media in connection with the victim's disappearance. Defendant also said "he did not want to take the polygraph, that he would be willing to take the polygraph as soon as the following day, as long as he had an attorney for the polygraph."

The officers returned a few days later and read defendant his *Miranda* rights. Defendant waived his rights and agreed to talk to the officers. The officers explained what had happened with the media but did not question defendant further. They asked if they could come back later to talk to him and he stated "of course." About two weeks later, the officers returned and again read defendant's his *Miranda* rights; defendant waived his rights and freely talked to the officers. During trial the officers testified about some of defendant's statements and defendant asserts this violated his rights under *Miranda*.

Defendant cites *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 69 L.Ed.2d 378], *People v. Neal* (2003) 31 Cal.4th 63, 67, and *People v. Bradford* (1997) 14 Cal.4th 1005, 1033-1034 in support of his argument the statements were not admissible because he had asked for a lawyer. We agree that these cases stand for the proposition that, once suspects invoke their right to counsel, law enforcement may not resume questioning them until counsel is present. But did defendant invoke his right to counsel before further questioning by the police? It is defendant's contention that, once he stated "he would be willing to take the polygraph as soon as the following day, as long as he had an attorney for the polygraph," he had invoked his right to remain silent under *Miranda* and that it was then improper for the police to even attempt to talk to him outside the presence of counsel. We disagree.

As the court stated in *People v. Gonzalez* (2005) 34 Cal.4th 1111: "Addressing whether police are required to ask clarifying questions of a suspect who

makes an equivocal or ambiguous request for counsel, the [United States Supreme C]ourt, while characterizing such questioning as 'good police practice,' 'decline[d] to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.' [Citation.]" (*Id.* at pp. 1124-1125.) Here defendant did not unequivocally invoke his right to remain silent under *Miranda*. He merely stated that he wanted to have an attorney present before he would submit to a polygraph examination. As the Attorney General notes, citing *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [107 S.Ct. 828, 93 L.Ed.2d 920], a limited invocation of *Miranda* rights does not preclude all further questioning. And here the officers made sure defendant's request for counsel was limited to the proposed polygraph examination by, once again, reading his rights to him before questioning him further.

*5. The $30 court facilities assessment was improperly imposed.*

Subdivision (a) of Government Code section 70373 (added by Stats. 2008, ch. 311, § 6.5), effective January 1, 2009, imposes a $30 fine for court facilities funding for a felony or misdemeanor. Defendant committed his crime in 2006 and was sentenced in 2009. The issue is clear: does the statute apply to crimes committed before its enactment?

Citing *People v. Alford* (2007) 42 Cal.4th 749, defendant acknowledges that, because the statute serves a non-punitive purpose, applying it to crimes committed before its effective date, does not violate prohibitions on *ex post facto* laws. But there is nothing in the statute that indicates an intent to apply it retroactively and defendant relies on the general rule that, "in the absence of a clear legislative intent to the contrary, statutory enactments apply prospectively." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1193-1194.)

Also relying on *People v. Alford, supra,* 42 Cal.4th 749, 754, the Attorney General argues that "[e]ven without an express declaration, a statute may apply retroactively if there is '"a clear and compelling implication"' that the Legislature intended such a result, [citations]" but then fails to provide us any meaningful legislative history showing such an intention other than the Legislative Counsel Digest. In quoting from this digest, the Attorney General relies solely on the name of the fund where the assessment is to be directed something called "the Immediate and Critical Needs Account of the State Court Facilities Construction Fund." We fail to see how the mere title of the account provides sufficient evidence of a legislative intent to apply the measure retroactively and therefore reverse the assessment.

*6. The minutes and abstract of judgment are incorrect and must be corrected.*

Defendant contends and the Attorney General agrees that the minute order and abstract of judgment need correcting. The court imposed a $5,000 restitution fine and stayed a $5,000 parole revocation fine. The minute order states the court imposed a $10,000 restitution fine and a $10,000 parole revocation fine. The abstract of judgment shows the court imposed a $10,000 restitution fine and a $1,000 parole revocation fine. We therefore order the clerk of the Superior Court to issue a corrected minute order nunc pro tunc and to prepare a corrected abstract of judgment.

## DISPOSITION

The judgment is affirmed, except as modified to delete the $30 court facilities fine. The clerk of the Superior Court is ordered to prepare a corrected minute order and a corrected abstract of judgment showing that the court imposed a $5,000

restitution fine and stayed a $5,000 parole revocation fine. The clerk is further ordered to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.